



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 54 OF 2019 (UR 40/19)

BETWEEN

THE ATTORNEY GENERAL.....1ST APPLICANT

LAND REGISTRAR, KWALE.....2ND APPLICANT

AND

LEISURE LODGES LIMITED1ST RESPONDENT

761 OTHERS.....2ND RESPONDENTS

(An application for stay of proceedings and stay of execution of the Judgment of the

High Court of Kenya at Mombasa (E.K. Ogola, D. Chepkwony & M. Thande, JJ.)

delivered on 23rd May, 2019

in

H.C. Petition No. 21 of 2010.)

RULING OF THE COURT

1. On 23rd May, 2019, the High Court at Mombasa, *(Ogola, Thande & Chepkwony, JJ.)* in *Petition No. 21 of 2010* entered judgment for the petitioner therein, *Leisure Lodges Limited*, the 1st respondent herein, whose effect, *inter alia*, was to cancel a multiplicity of titles that were found to have been unlawfully created and registered over the respondent's parcels of land known as *Kwale/Diani Beach Block 856, 551, 552, 553, 554, 555, 556, 557, 558* and *559, the suit properties*. The said titles had been issued to hundreds of people, now referred to as the 2nd respondents in this application.

2. On 4th June, 2019, *the Attorney General*, the 1st applicant being dissatisfied with the aforesaid judgment, filed a notice of appeal and applied for typed proceedings of the High Court matter with a view to lodging an appeal. On the strength of the notice of appeal, the applicants now urge this Court to grant stay of execution of the aforesaid judgment and all other consequential orders and proceedings and extend the 45 days' stay granted by the High Court, pending filing, hearing and determination of an intended appeal.

3. The application is supported by an affidavit sworn by *Dick Safari*, the County Land Registrar, Kwale. The deponent stated that the matter entails a large number of respondents within the larger Diani Settlement Scheme, more than a thousand, who will be affected by the High Court decision, if it is implemented, and therefore the matter is of public importance.

4. The Land Registrar further stated that the High Court, in granting absolute ownership of *Plot No. Diani Beach/856* to the 1st respondent shall stall the resettlement of genuine squatters who had been identified; that the land in question was to be used for staging an Agricultural Show by the Ministry of Agriculture and the Agricultural Society of Kenya in 1988; that in the same year, the 1st respondent applied for land parcel No. 860 belonging to the veterinary farm in exchange for another parcel of land; that subsequently the Kwale District Development committee agreed to exchange 20 acres of land parcel No. 858 with 48 acres of parcel No.853 offered by Darad Farm, a subsidiary or a sister company of the 1st respondent.

5. The Land Registrar further stated that since parcel No. 860 had squatters, the 1st respondent proposed to offer Plot No. 8517/10 Gombato Farm, to settle the squatters to give room for development of a golf course but it never did so, thus the squatters were not re-settled. Consequently, the 1st respondent was asked to surrender parcel No. 856 but it has not done so, yet it now wants to evict the squatters. These are issues that the court should have considered in the determination of the dispute, the applicants argued.

6. **Mr. Wachira**, learned State Counsel for the applicants, submitted that the intended appeal is arguable; and that unless the orders sought are granted, the squatters, who were given titles to the parcels of land they now occupy, shall be evicted, in which event the intended appeal, if successful, shall be rendered nugatory. He therefore urged the Court to allow the application.

7. Learned counsel, **Mr. Asige**, who was named in the petition as the 298th respondent and who also appears for some of the other respondents, submitted that the 1st respondent's matter before the High Court was a constitutional petition filed against over 700 respondents, where it was alleged that the respondents had infringed upon the 1st respondent's constitutional rights; that it was the duty of the 1st respondent to identify as against each respondent the constitutional right they had violated, which the 1st respondent did not. That is an arguable issue, counsel submitted.

8. Mr. Asige further submitted that in the petition that was before the High Court, the 1st respondent had stated that there were over 110 civil cases that had been filed by different persons over the same subject matter; that most of those suits were still pending before various courts; that most of the respondents herein were not parties to two suits where consent judgments were entered in favour of the 1st respondent, yet they are in occupation of some of the suit properties or portions thereof; that unless this Court grants stay of execution of the High Court judgment all the respondents' households shall be demolished, yet they have valid title deeds, and the appeal, if successful, shall be rendered nugatory.

9. **Mr. Ngibuini**, learned counsel for the 24th respondent, fully supported the submissions by Mr. Wachira and Mr. Asige. He urged the Court to consider that demolition of over 700 houses before the intended appeal is heard and determined would be prejudicial to the applicants and would cause serious tension in the area.

10. The 1st respondent filed a replying affidavit that was sworn by **John K. Mutua**, a Director and the former Chief Executive Officer of the 1st respondent. On the basis of advice given to him by the 1st respondent's advocates, **Mr. James Ochieng' Oduol** and **Mrs. Eunice Kibe**, Mr. Mutua stated that the intended appeal is not arguable and would not be rendered nugatory if the interim orders were denied.

11. Mr. Mutua stated that the applicants deliberately failed to produce several critical documents among them, orders in **HC Land Case No. 188 of 2008, Leisure Lodges Limited vs The Commissioner of Lands, The Chief Land Registrar, The Land Registrar, Kwale and the Attorney General, Nairobi Civil Case No. 217 of 2008, Leisure Lodges Limited v The Commissioner of Lands and Others** and the decrees issued in those two matters where it was ordered by consent that the suit properties are owned by the 1st respondent. No appeal has been preferred against the said decisions. Some public officers who disobeyed the court orders issued in the above matters restraining them from interfering with the 1st respondent's right to occupation and ownership of the suit properties were found to be in contempt of court and punished accordingly.

12. The 1st respondent discounted the applicants' contention that part of its land had been set apart for settlement of squatters. It was contended the allegation was a fraudulent scheme that was hatched by some influential people with the objective of unlawfully acquiring part of the 1st respondent's land; and that in view of the High Court's finding the applicants are now precluded by issue, subject matter and judgment estoppel from seeking to re-litigate issues that are res judicata, the 1st respondent stated.

13. In his submissions, Mr. Oduol, learned counsel, who together with learned counsel, Mrs. Kibe, appeared for the 1st respondent, submitted that the notice of appeal on record was by the Attorney General only, the **Land Registrar, Kwale**, (the 2nd applicant) had not filed any; that the other respondents are not named in the notice of appeal; that the parcels of land in dispute are lawfully owned by the 1st respondent and it is unfortunate that the Attorney General was defending government officers who had been found guilty of manipulating land registration systems for their own benefit.

14. Mr. Oduol further submitted that the intended appeal is not arguable because the High Court, (**Sergon, J.**) found that most of the titles held by the majority of the other respondents had been issued in violation of express court orders and the persons who were found to be in contempt of court were duly convicted and fined. No appeal was ever preferred against that finding. As stated in their replying affidavit, counsel added, there are no genuine squatters on the suit properties, some of the so called squatters are wealthy public servants who acquired their title deeds unlawfully.

15. Lastly, counsel submitted that to grant a stay of execution in the circumstances as aforesaid would be to encourage impunity. We were therefore urged by the 1st respondent to dismiss the application with costs.

16. We have carefully considered the application, submissions by counsel and the 1st respondent's list of authorities and digest of cases. An application of this nature can only be granted if it is shown that the appeal or intended appeal is arguable, and that the appeal or intended appeal, if successful, will be rendered nugatory unless the orders sought are granted. In **Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR**, the Court summarized the principles that it considers in **rule 5(2)(b)** applications as follows:-

“i) In dealing with Rule 5(2)(b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.

vi) The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

vi) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii) *In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

viii) *An applicant must satisfy the Court on both the twin principles.*

ix) *On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

x) *An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.*

xi) *In considering an application brought under Rule 5(2)(b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

xii) *The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

xiii) *Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.*

xiv) *Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim.”*

We shall proceed to determine the application before us with the above principles in mind.

17. As earlier stated, in the impugned judgment the High Court found that the ten parcels of land in dispute are owned by the 1st respondent, which was not disputed by the applicants, but they contended that the 1st respondent reneged on the agreement to surrender another parcel of land at an area known as Gombato for resettlement of some squatters. That allegation was denied by the 1st respondent. Regarding this issue, the learned judges stated:-

“99. We have carefully looked at the record. There is correspondence on record to show that the Petitioner did indeed purchase the Gombato land from Gombato (1975) Ltd. By a letter dated 15th July, 1993, the Petitioner forwarded to its then advocates, Asige Keverenge & Anyanzwa Advocates, The 298th Respondent, a cheque for Kshs.1,860,000/= payable to National Bank of Kenya Limited in exchange for the title documents including the discharge of charge. The 298th Respondent by a letter dated 4th August, 1993 and addressed to the Bank, acknowledged receipt of the documents. There is also a letter dated 9th August, 1993 from the Kwale District Commissioner informing the District Surveyor that the Petitioner had purchased the Gombato land for resettlement of squatters. He further directed the District Surveyor to assign a surveyor to survey the Gombato land to enable the squatters move in by 15th August, 1993. There was a follow up letter dated 19th October, 1993 seeking an update.

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100. The foregoing is indicative of a party who was willing to resettle squatters on land purchased for that purpose. Further, a certificate of Postal Search indicated that as at 4th September, 2008, the Gombato land was still registered to Gombato (1975) Limited. The record shows that the original title documents are in the custody of the 298th Respondent who has not denied the allegation. It is therefore not clear why the Attorney General would assert in the Cross Petition that the Petitioner illegally reneged on its promise and disposed of the Gombato land. Even if it were the case that the Petitioner had deliberately declined to have the squatters settled in the Gombato land, our view is that the Government ought to have exercised its powers compulsorily to acquire the same instead of proceeding to take over Plot 856 which measures 58.28 hectares approximately 144 acres compared to Gombato land's 93 acres. The purported revocation of title to Plot 856 is in our view is unjust.”

18. We have looked at the draft memorandum of appeal and there are several grounds of the intended appeal that relate to the above findings by the High Court. For example, the proposed grounds 1 and 2 read as follows:-

“1. That the learned judges erred in law and facts when they overlooked that this matter entails a large number of defendants/respondents within the larger DIANI SETTLEMENT SCHEME thus it is a matter of public interest and importance as parties who will be affected are more than 1,000 land owners as opposed to one party, the 1st respondent herein.

2. That the learned judges erred in facts when they made order granting the Respondent absolute ownership of the Plot Number Diani Beach/856 which shall stall the resettlement of genuine squatters who had been identified by the 1st respondent the management of Leisure Lodges and offered Plot No. 8517/10 Gombato Farm to settle the squatters to give room for the development of a golf course.”

19. In our view, these are arguable grounds of appeal. We must restate that an arguable ground is not one that must succeed when the appeal is eventually heard, it is rather a ground that is not frivolous and merits this Court's consideration.

20. Turning to the nugatory aspect, unless this Court grants the orders sought, there will be nothing to stop the 1st respondent from

demolishing all the structures and evicting all the people who are in occupation of the suit properties before the intended appeal is heard and determined. In the event that the intended appeal is successful, it shall have been rendered nugatory, we so find.

21. Lastly, the dispute over the suit properties between the parties herein has been in Court since 2007 or thereabout. We do not think that the 1st respondent shall suffer any serious prejudice by waiting for a few more months for this Court to hear and determine the intended appeal. It is in the interest of justice that the intended appeal be heard and determined expeditiously.

22. In conclusion, we hereby order stay of execution of the judgment delivered by the High Court on 23rd May, 2019 and all other consequential orders pending hearing and determination of the intended appeal, **subject to** the following conditions:-

(i) The intended appeal shall be filed and served within 45 days from the date hereof.

(ii) If the intended appeal is not filed and served within the stipulated period of time, the orders granted herein shall stand discharged and the application dated 2nd July, 2019 shall stand dismissed.

23. Each party shall bear its own costs of this application. It is so ordered.

Dated and delivered at Malindi this 14th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR